(1) 00-1079

Supreme Court, U.S.
FILED
DEC 18 2000
OFFICE OF THE CLERK

NO._____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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Janet L. Douglass,
Petitioner,

v.

The United States of America, et. al.,
Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

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Janet L. Douglass
Petitioner

Janet L. Douglass
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Pro Se Petitioner

61 pp

## QUESTION PRESENTED

**Question 1:** Can the Department of Transportation, Federal Aviation Administration violate the First Amendment Establishment Clause and practice, promote and establish for itself a pagan religion to covertly inflict pain, suffering and even death to prevent their employees from filing lawsuits against them in Court when officials engage in prohibited personnel practices?

**Question 2:** The courts below have applied the *Bush v Lucas* scheme and dismissing Plaintiff's claims based on a *Bivens v Six Unknown FBI Agents* scheme. Considering the facts of this case officials have engaged in prohibited personnel practices and have violated Plaintiff's guaranteed Constitutional Right to Privacy and the Penumbra to the Constitution as an employee and a U.S. Citizen. How then, is the Bush scheme an adequate substitute at law and equity considering the liability of the individual officials that engaged in violations of the Constitution, an a violation of the oath they took upon entry into a Civil Service position to uphold the Constitution through the duties of their positions?

**Question 3:** The Courts below have dismissed Plaintiff's Physical Handicap claim based on the "covered entity" of Americans with Disabilities Act ADA. The Rehabilitation Act of 1973 at Sections 501 and 504 and 5 U.S.C.S. Section 2302(b)(1)(D) includes the "covered entity" factor and relates it to the ADA is it not?

**Question 4:** Can a Rule 41(b) Involuntary Dismissal stand when all the evidence through discovery has not been supplied to the court? Is it abuse of discretion when a judge dismisses an entire case under Rule 41(b), a severe sanction, for not following the Orders of the Court, when the Judge errors in his outline of remaining claims in the order and omits a claim that has not been previously dismissed and plaintiff includes the omitted claim with explanation by reference in the pleading?

## LIST OF THE PARTIES

RESPONDENTS:

The UNITED STATES OF AMERICA AND;
The Attorney General of the U.S. at Washington D.C. and
The U.S. Attorney at Fort Worth Texas (817) 798-3291
The Department of Transportation, Secretary and Successors
400 7th Street, S.W.; Washington D.C. 20590 (202) 366-4000
The Federal Aviation Administration, Administrator and Successors; 800 Independence Ave., SW; Washington (202) 267-8213
The Federal Aviation Administration, Southwest Region Administrator and Successors; 2601 Meacham Blvd; Fort Worth, TX (817)222-5001
Thomas J. Lucas in Capacity of Assistant Manager Federal Aviation Administration and Individually; SW Region 4601 Meacham Blvd; Fort Worth, TX (817)222-5000
Marvin Benson in Capacity of Supervisor Federal Aviation Administration SW Region Technical Inspection Office and Individually; SW Region; 4601 Meacham Blvd; Fort Worth, TX (817) 222-5000
Roger G. Knight in Capacity of Manager Flight Standards Division Federal Aviation Administration, Southwest Region and Successors and in the Capacity of Acting Regional Director Southwest Region and Individually; 2601 Meacham Blvd; Fort Worth, TX (817) 222-5000
Walter M. Ernst, Jr. and Loyd M. Halliburton in Capacity of Managers Federal Aviation SW Region Certificate Management Office and Individually; 1205 Royal Lane, Irving, T X
Ronald H. Peay, in Capacity of Manager, Federal Aviation Administration SW Region Civil Aviation Security Division and in Capacity of Manager, Investigations and Internal Security Branch and Individually; 4601 Meacham Blvd; Fort Worth, Tx
Peter B. Dodd in Capacity of Investigator, Federal Aviation Administration SW Internal Security Branch and Individually 4601 Meacham Blvd; Fort Worth, TX (817) 222-5000

PETITIONER:
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Janet L. Douglass respectfully petitions for a Writ of Certiorari to review the Order/s of the United States District Court for the Northern District, Fort Worth Division. Petitioner claims this case contains important issues, which will affect the future of this country.

BELOW

The Opinions of the U. S. Court of Appeals for the Fifth Circuit (App. infra, A) reported as No. 99-11288. The Opinions of the District Court (App., infra, B) reported at No. 4:94-CV-364E.

JURISDICTION

The Fifth Circuit Court of Appeals entered its Order on Rehearing September 19, 2000. Therefore this Writ for Certiorari is timely filed within 90 days from September 19, 2000. Jurisdiction is invoked under Title 28, U.S.C. Section 1254(1). Notifications to the Solicitor General of the United States in accordance with Rule 29.4(b).

STATUTORY PROVISIONS INVOLVED

The Department of Transportation, Federal Aviation Administration (DOT/FAA) is engaged in the practice and promotion of a pagan religion – witchcraft that is in violation of the First Amendment to the Constitution known as the "Establishment Clause." Cites the Freedom from Religious Persecution Act of 1997. *Agostini et al v. Felton, et al*, No. 96-552, U.S. S.Ct. and *Everson v. Board of Education of Ewing*, 330 U.S. 1, 8-10, 15, 16 (1947).

Title 42 Sections 1983/5/6, Petitioner stands on this remedy claiming officials have acted outside the scope of their employment in a conspiracy engaging in prohibited personnel practices at 5 U.S.C..S. Section 2301 and 2302(b). see *Penn v. United States*, 350 F. Sup 752 (1972 MD Ala) Court ruling insists Petitioner's only remedy is under the CSRA and FTCA, affording officials absolute immunity from any personal liability. Petitioner claims a *Bivens* action see *Bivens v. Six Unknown FBI*

*Agents*, 403 U.S. 388, 29L. Ed 2d 619, 91 S. Ct 1999 Disparate Treatment see *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973) Concerning the orders for amended pleadings she cites *Leatherman v. Tarrant County Narcotics Unit, 113 S.Ct. 1160 (1993).*

Violations of The Privacy Act of 1974 by Defendants' breach of promise of anonymity, then widely published her name (coded as a control number, a particular identifier, the intent of the Privacy Act of 1974 was to keep confidential all identifiers of any Protected Disclosure including any number identifying any part of a protected disclosure). See *Bartel v. FAA, 725 F2d 1403, 1410-11 (DC Cir. 1984) Pope v Bond* 641 F.Supp 489 (DDC 1986) Privacy Act of 1974 Sec. 2.b(2) and Sec. 2.b(4)

The Americans with Disabilities Act allows filing suit against officials in their "covered" capacity and individually. The Rehabilitation Act of 1973 at Sections 501 and 504 relates covered entity (includes DOT/FAA) to the ADA. See *Lengen v. Department of Transportation*, 903 F.2d 1464 (11th Cir 1990); *McNutt v. Hills* 426F. Supp 990 (1977) Petitioner filed nine discrimination complaints in this cause of action, based on gender, reprisal, religion, race, two separate instances of sexual harassment/hostile working environment and physical handicap. The defendant's have yet to answer her complaints. As a matter of fact, the Defendant's have yet to answer any of the Plaintiff's complaints. Defendant's by motions to dismiss complain they have no answer because they cannot formulate one from Plaintiff's pleadings. Hence, the judge continues to order amendments, satisfying the Defendants and causing undue delay. Plaintiff complains about the delay of almost 8 years because Defendants' have no defense no matter how much information is given to them. Petitioner filed a motion for early setting and requested a preliminary injunction that would have immediately put this on the trial docket and resolved this case, but she was denied. Petitioner cites *Leatherman* supra See Appendix A – Volume 1 ORANGE 7.

Dismissal under Rule 41(b) see Durgin v. Graham, C.A.5th, 1967, 372 F.2d 130 Certiorari denied 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1365 and Pardee v. Stock, C.A.8th, 1983, 712 F.2d 1290. And Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 1958, 78 S.Ct. 1087, 1094, 357 U.S. 197, 209,1 L.Ed.2d 1255 Petitioner claims the district court judge abused his discretion about this involuntary dismissal and has demonstrated bad faith, first with his unfiling petitioner's reply in opposition to defendant's motion to dismiss See Appendix A – Volume 1 PURPLE 55, 56, 57. The exhibits attached to this pleading are evidentiary of genuine issues of material fact of Privacy Act of 1974 violations. The district court judge below abused his discretion by not directly answering petitioner's Motion for Clarification filed May 27, 1997 see Appendix A – Volume 2 GREEN 2. The court caused undue delay by expecting her to file proper amended complaints without clarifying his orders that were in conflict.and claims were omitted and not addressed. by the court until September 14, 1998 and even then the wrongful termination claim was not discussed but was dismissed when the Second Amended Complaint was dismissed. For example, petitioner's disparate treatment claim about the wrongful termination plead in her second amended complaint a viable claim was just dismissed without merit for dismissal. See Order dated May 21, 1998, p 20 last paragraph (above signed by line). Note the wrongful termination claim is allowed, but in the September 14, 1998 Order outlining remaining claims, the outlines omits this wrongful termination claim accompanied by the disparate treatment discrimination claim that is completely lost by abuse of discretion of the judge.

## STATEMENT OF THE CASE

Petitioner, an employee of the Federal Aviation Administration (FAA) in January 1988 made a protected disclosure to FAA and Department of Transportation (DOT) Hotlines and requested she remain anonymous concerning a high level official who allegedly

built his house with government money and employee talent.[1] It should be noted that a protected disclosure is not "routine" considering the FAA "routinely" do not receive disclosures of prohibited personnel practices found at 5 U.S.C.S. 2302(b)(8). specifically, waste, fraud and abuse. This disclosure is exempted from disclosure without the consent of Petitioner.

August 1990, Petitioner was forced into another Division, where the Division Manager was the acting regional director when she blew the whistle, she sensed mild harassment resulting from the change of duties. By summer of 1992, the harassment intensified, with bogus reprimands, oral and written, then a bogus removal in May 1993, she no longer had protection from the FAA Administrator who promised her no retaliation would happen he would not allow it.[2]

As a result of the bogus removal, officials discriminated against Petitioner and she the filed formal complaint June 1993. (Petitioner was falsely accused of assault charges and was suspended March 29, 1993 for 10 hours.) Petitioner appealed the removal to the MSPB and it was found to be illegal. The administrative law judge in his Opinion December 1993, found Petitioner's Performance Standards deficient and ordered her records restored pending a final decision from any Petition for Review. The administrative law judge placed her on a stay under the provisions of the WPA of 1988 at Section 6. However, prior to any final decision in the appeal, the deciding official ordered her back to the workplace Valentine's day, February 14, 1994 where he sexually harassed her along with other officials creating an intensified hostile work environment. The officials removed her from a flexible work schedule she had maintained for almost 2

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[1] The FAA reassigned allegedly a black witch, Ms. Laverne Smith Scales, a degreed engineer into her section early 1989.

[2] Psychically, strange things were occurring October 1990, Petitioner started a journal, tracking the strange feelings and energy she was feeling to ascertain the source. Fall 1990 the strange psychic feelings were intensifying and Petitioner continued her journal, noting that LaVerne Scales continued to keep in touch with her by phone, and even came uninvited to her house one Sunday afternoon late in 1990 and wanted to see every room in her house, including the backyard? Scales wanted her home address to send her a "gift," when Petitioner refused, Scales begged her stating that "Petitioner wouldn't want Scales to miss her "blessing" would she." Unfortunately, Petitioner gave her the address, to her own peril.

years, eliminating the 10 hour day, 4 day work week she enjoyed to continue her college education. Petitioner filed a discrimination complaint, since male peers enjoyed the 10 hour day, 4 day work week based on sex.

Petitioner developed ulcer disease from the hostile work environment; however, the deciding official would not grant her the needed sick leave to recuperate away from the hostile work environment. The ulcer disease worsened. Petitioner presented a certified physician's letter to the deciding official stating that her condition had worsened while on a medication program to cure the ulcer disease stating that if she did not have the needed time away from the stress, her condition would be guarded. Petitioner filed two sexual harassment formal complaints, and another discrimination complaint based on physical handicap since she is a diabetic and a qualified individual under the ADA.

Petitioner was forced to file this lawsuit in Federal Court since the deciding official refused to grant her sick leave in an attempt to force her to quit her job. Petitioner moved the Court for an injunction to prevent a second removal by the deciding official stating that he was retaliating against her that he knew she was the Whistleblower and stood on the provisions of the WPA. The Court denied her injunction, refusing to invoke supplemental jurisdiction but ordered the needed sick leave to recuperate. The deciding official continued with his goal to remove her while she was on sick leave, but he did not have any substantial reason to do so. The deciding official then decided to investigate her to find a reason to remove with no success. Petitioner complained he violated her first and fourth amendment rights by his investigation into her private life, her activities outside duty time. Cites the Penumbra to the Constitution. The deciding official who knew she was a Whistleblower retaliated and removed her a second time August 11, 1994, alleging she abused sick leave and was uncooperative. Investigators held at least three frivolous meetings forcing Petitioner to appear at the work place while on sick leave for three separate interviews evidencing continued sexual harassment by the deciding official. Petitioner cried for relief from the federal district court who silently watched. (The federal court

believed the MSPB had authority over this case at that time. However, Plaintiff argued the case was ripe for judicial review since the DOT/FAA was found to have removed Petitioner illegally by Initial Decision dated 12/06/1993 by MSPB.)

The same official that decided the first removal who, under oath, testified that he knew Petitioner was a Whistleblower decided the second removal. (See Appendix A Volume 2 GREEN 7 Exhibit 2 Lodging). Two days after the effective date of the second removal, an FAA payroll supervisor wrote a demand letter to Petitioner's financial institution stating that Petitioner, an employee, owed the government money for sick leave. They demanded the financial institution return all of Petitioner's money from her checking and savings account immediately to the U.S. Treasury without Petitioner's consent or knowledge and in violation of due process of law.

Petitioner appealed the second removal all the way to the U.S. Supreme Court, and Cert was denied February 1995. Note: The MSPB held a prehearing on 2/23/95 since compelled discovery was not supplied to Petitioner for examination but verbally stated for the record, the DOT/FAA Attorney admitted that Connie Pyatt, was detailed to Petitioner's position while Petitioner appealed the first removal. Connie Pyatt was Roger G. Knight's secretary. She had been suspended for 2 counts of embezzlement of funds but not removed. On the record the ALJ found disparate treatment. Plaintiff filed a Formal Discrimination Complaint for this disparate treatment March 30, 1995. Note: Roger G. Knight was the approving official about Petitioner's first removal.

Petitioner experienced the first psychic death blow, the evening before the day of her deadline to reply to District Court October 1994. ( This issue was originally plead as an 8th Amendment violation stating "cruel and unusual punishment" and malicious prosecution in Original Complaint and Jury Demand see Appendix A – Volume 1 PURPLE 1) This psychic energy began to penetrate her heart area while she was typing. The energy hit her head, at the temple, however, the psychic energy was on her left shoulder blade, around the heart area. These attacks began nightly, gaining in intensity until they were frequent through the

night and day. The attacks at night were so strong, that she filed a complaint with the local police, April 1996 requesting they confiscate any voodoo doll identity of Petitioner on Ms. Scales' alter to destroy the energy. The Police did nothing since there are no laws against witchcraft, but in jest, stated if Petitioner brought the police a picture of the witch, they would look into it. Petitioner put two 35 mm Camera's in her room and one camcorder. April 19, 1996 Petitioner was successful in capturing a photograph of the witch, she alleges is Ms. Scales, an employee of the FAA, and the video from the camcorder reveals at least 23 blows to the head, while asleep. The photographs were provided to the police, with no relief.. Petitioner began taking pictures every night, learning the true story of this retaliation.. Petitioner presents that story to you by Appendix A – Volume 2 at PINK 2 (Appendix C). In 1996, Petitioner constantly received hang-up calls, through the night, began to realize the connection was maintained through the telephone. Petitioner notes that the camera can see the entity on the gamma ray, and so can a dog. Just because the human eye cannot see, it does not mean it doesn't exist, we just can't see it, like a microwave. Witchcraft is dangerous, it's covert and deadly. Petitioner claims victims of witchcraft usually die, or go temporarily insane like what happened to Mr. Pope who was a Whistleblower in the FAA. Note: When the statute of limitation tolled on Mr. Pope's case, he was immediately released from the Mental Institution. See Pope v. Bond, 641 F. Supp 489 (1986).

Death threats were made on Petitioners life, she was being stalked by the witch who was constantly calling on the telephone and hanging up when the phone was answered. Petitioner put up a web site and published the photographs in a book resulting in obedience to God. On the Guestbook, (August-September 2000) on the web site at www.godiscoming.com posts were being made threatening to kill petitioner, demanding to know if Petitioner was going to write another book - this one. (Criminal Acts) Plaintiff filed the documents in court pleadings See Appendix A Volume 2 Lodging at BLUE 1-4. Also in that same Volume 2 at GREEN 7 are photographs of the destruction to her left ear resulting from psychic attacks .

## ARGUMENT

Granting this Writ is necessary to review the sanctions by the lower court and rulings begging for technical dismissal, through all of the amended pleadings required by the lower court, without benefit of an answer to petitioner's Motion for Clarification of conflicting orders. As such those Orders and Rulings dismissed call for the exercise of this Court's supervisory power. Specifically the dismissal under Rule 41(b). Dismissal of the Bivens action under constitutional violations. Privacy Act of 1974 All Title VII discrimination claims dismissed, including Disparate Treatment, Sexual Harassment, Sex, Religion and Retaliation resulting from Whistleblowing activities. Petitioner was unaware that the trial would be on paper. She cites Claims under the color of State law, specifically Malicious Prosecution. Defendants' claim no criminal action filed against Petitioner is an element to meet in Malicious Prosecution. Petitioner claims that Retaliation against her is a criminal act and because of that retaliation Defendants' in conspiracy removed Petitioner and Petitioner appealed the removal and prevailed on the removal.

The Subject matter of this Writ is of national interest. The covert activity of witchcraft is deadly. It is obvious the defendants have an excessive entanglement with this religion, since defendant, while at government-owned facilities, use government property (i.e., telephones, computers and a government-wide internet service provider, ISP) are being used to carry-out the transmit the practice and principles of witchcraft. Plaintiff cites Freedom from Religious Persecution Act of *Agostini et al v. Felton et al,* No. 96-552, U.S. S.Ct 1997; *Lemon v. Kurtzman,* 403 U.S. 602, *Lee v. Weisman,* 505 U.S. 577. The defendants' secretly, covertly participate in the affairs of witchcraft in violation of the Establishment Clause of the First Amendment. See *Everson v Board of Education of Ewing, 330 U.S. 1, 8-10, 15, 16 (1947)*

. We have willingly given satan our government by the misinterpretation of what Jesus Christ said " Leave to Caesar what belongs to Caesar, leave to God what belongs to God.

Jesus meant that Caesar was a pagan, he follows Satan, believers follow God. Petitioner claims we have limited our government's true power by our misinterpretation of separation of church and state. You cannot separate God from an entity and expect it to be "neutral" in terms of good and evil. You are either for God or against Him. What has happened to petitioner by Defendants' covertly causing pain and suffering and even death is outrageous and must be stopped. Note the many airplane crashes that are unexplainable, FAA has engaged satanic worship to covertly solve difficult situations. This form of retaliation is evil, outrageous, and a threat to public safety for our children and grandchildren. Petitioner prays the justices of this court open their mind and ears to hear the truth, she prays this court will take positive corrective action about the violations presented in this case; petitioner prays for relief, prays this Honorable Court grant this Writ, in the interest of equity and Justice and settle this case

Respectfully submitted,
Janet L.. Douglass
Pro Se Petitioner

**APPENDIX 1**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CAUSE NO. 99-11288**

1. , September 19, 2000 on Petition for Rehearing En Banc

2. Order: August 30, 2000

3. Summary Calendar Filed July 20, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11288

JANET L. DOUGLASS

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA; ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA Washington; US ATTY, at Dallas; DEPT OF TRANSPORTATION; THE FEDERAL AVIATION ADMINISTRATION, Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Flight Standards Division Managers; ROGER G. KNIGHT; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Airways Facilities Assistant Division Manager; WALTER M ERNST, JR, Federal Aviation Administration Southwest Region Certificate Management Office Manager; LOYD M HALLIBURTON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; MARVIN D BENSON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; THOMAS J LUCAS, Individually and as Assistant Manager Federal Aviation Administration Southwest Region Airways Facilities Division; RONALD H PEAY, Individually and as Manager Federal Aviation Administration Southwest Region Civil Aviation Security Division; PETER B DODD, Individually and as Investigator Federal Aviation Administration Southwest Region Internal Security Branch; FEDERICO PENA, Secretary of Transportation; RODNEY SLATER, Department of Transportation

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:94-CV-364-E

ON PETITION FOR REHEARING EN BANC

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5th CIR.R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11288

JANET L. DOUGLASS

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA; ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA Washington; US ATTY, at Dallas; DEPT OF TRANSPORTATION; THE FEDERAL AVIATION ADMINISTRATION, Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Flight Standards Division Managers; ROGER G. KNIGHT; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Airways Facilities Assistant Division Manager; WALTER M ERNST, JR, Federal Aviation Administration Southwest Region Certificate Management Office Manager; LOYD M HALLIBURTON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; MARVIN D BENSON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; THOMAS J LUCAS, Individually and as Assistant Manager Federal Aviation Administration Southwest Region Airways Facilities Division; RONALD H PEAY, Individually and as Manager Federal Aviation Administration Southwest Region Civil Aviation Security Division; PETER B DODD, Individually and as Investigator Federal Aviation Administration Southwest Region Internal Security Branch; FEDERICO PENA, Secretary of Transportation; RODNEY SLATER, Department of Transportation

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:94-CV-364-E

Before, EMILIO M. GARZA
BY THE COURT:

ORDER:

IT IS ORDERED that the appellant's motion to supplement the record on appeal with miscellaneous documents is DENIED.

EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-11288
USDC No. 4:94-CV-364-E

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. JANET L. DOUGLASS

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA; ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA Washington; US ATTY, at Dallas; DEPT OF TRANSPORTATION; THE FEDERAL AVIATION ADMINISTRATION, Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Administrators; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Flight Standards Division Managers; ROGER G. KNIGHT; THE FEDERAL AVIATION ADMINISTRATION, Southwest Region Airways Facilities Assistant Division Manager; WALTER M ERNST, JR, Federal Aviation Administration Southwest Region Certificate Management Office Manager; LOYD M HALLIBURTON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; MARVIN D BENSON, Federal Aviation Administration Southwest Region Certificate Management Office Manager; THOMAS J LUCAS, Individually and as Assistant Manager Federal Aviation Administration Southwest Region Airways Facilities Division; RONALD H PEAY, Individually and as Manager Federal Aviation Administration Southwest Region Civil Aviation Security Division; PETER B DODD, Individually and as Investigator Federal Aviation Administration Southwest Region Internal Security Branch; FEDERICO PENA, Secretary of Transportation; RODNEY SLATER, Department of Transportation

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas

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Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges,

PER CURIAM:

:

Janet Lou Douglass appeals the district court's dismissal of her complaint against the United States, the Department of Transportation ("DOT"), the Federal Aviation Administration ("FAA"), and various individuals (collectively, "the government). We affirm.

I.

In May 1994, Douglass, a former FAA employee, commenced this action against the government. She asserted numerous claims, all of which stemmed from the DOT's alleged retaliation against her for "blowing the whistle" on an FAA Airway Facilities Manager and her alleged wrongful termination.

> Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Douglass raised the following non-constitutional claims non-Title VII discrimination claims based on race, physical disability (Douglass is diabetic), sex, and religion; and Title VII discrimination claims based on "whistle blowing activity and religion," sex, race, gender, and reprisal; and violation of the Privacy Act, 5 U.S.C. Section 552a, et seq. She also claimed that (1) her Fifth Amendment rights were violated when her employment was suspended without a proper hearing, (2) her Fourth amendment rights were violated when FAA investigators obtained her college transcript without her permission, (3) her First Amendment rights were violated when she was retaliated against by speaking out against illegal practices within the FAA, and (4) her Fourteenth Amendment rights were violated when she was sexually harassed by individuals at the FAA.

The district court dismissed most of the claims in Douglass' first amended complaint

Specifically, the court dismissed with prejudice (1) most of Douglass' Title VII discrimination claims (2) all Title 28 and Title 42 claims, (3) all constitutional claims, and (4) all non-constitutional torts. The district court dismissed without prejudice Douglass" (1) Title VII claims stemming from EEO

complaints made in 1994 based on her failure to establish exhaustion of remedies, and (2) claim of unlawful discharge. Finally, the court granted the government's motion for summary judgment on Douglass' Privacy Act claim. It did not, however, dismiss Douglass' Title VII claims based on gender and Whistleblowing activity. Finally, the court granted Douglass leave to replead the claims that it had dismissed without prejudice.

Douglass was granted several extensions of time in which to file an amended complaint. After she filed her second amended complaint, the government filed a motion to strike portions of the complaint, to dismiss, and for a more definitive statement. Douglass then sought leave to file a third amended complaint, and the defendants renewed their motion.

In September 1998, the district court held that Douglass' second amended complaint contained "irrelevant and impertinent information interlaced with possible valid claims, rendering the complaint virtually incomprehensible to any analysis of the proper claims." It further determined that Douglass had included claims previously dismissed with prejudice, and it required her to replead any proper claims. Finding that her their amended complaint suffered from similar defects, the court denied Douglass leave to file that complaint.

In the same order, the district court also denied the government's motion to dismiss and, in light of her pro se status, granted Douglass opportunity to amend her complaint again in order to state her claims with particularity. The court provided Douglass with a list of the claims still remaining and expressly instructed her not to include in the fourth amended complaint any claims previously dismissed with prejudice or n which it had granted summary judgment. It further instructed her to include in her complaint only the facts relevant to the remaining claims and to limit her filing to twenty-five pages. Noting the numerous extensions of time that had already been granted, the court stated that no further extensions would be granted without a showing of good cause and that failure to comply with its order could result in the dismissal of Douglass' actions.

Douglass requested, and received, an extension of time in which to file her amended complaint based upon her assertion that a "feeler of lightning" had damaged her computer. The court found Douglass' subsequent motion for extension of time – based upon a contention that her insurance company had still not repaired her computer – insufficient. The court did, however, grant her a brief four-day extension in which to file her complaint.

Douglass filed a timely third amended complaint and, two weeks later, a motion for leave to file a fourth amended complaint. The court granted her leave to file the fourth amended complaint, and the government and individual defendants moved to dismiss under Fed. R. Civ. P. 41(b), or, alternatively, for failure to state a claim.

In September 1999, the district court dismissed with prejudice the fourth amended complaint pursuant to Rule 41(b). In doing so, the court found that rather than following its instructions for filing, Douglass had "obstinately included in her Fourth Amended Complaint all the factual allegations of her proposed Third Amended Complaint, even though many of the factual allegations relate to claims previously dismissed by the Court." It further found that Douglass had tried to evade the its earlier orders by reducing the typeface of her complaint and including a twenty-eight-page allegation of facts as an exhibit and that her "repeated failure to properly plead or amend her caue of action and failure to comply with the Court's orders [had] caused undue delay and [was] evidence of bad faith."

On appeal, Douglass argues that the district court erred in dismissing her action under Rule41(b). She further contends that the court erred in its May 1996 order by dismissing her *Bivens* claims, state and title VII discrimination claims, ADA claim, malicious prosecution claim, and disparate treatment claims. Finally, she alleges that the court erroneously granted summary judgment on her Privacy Act claim.

Douglass raises several other issues – including religious discrimination and the FAA's use of a "witch" to "maliciously and outrageously ... covertly attack[]" her –for the

first time in her reply brief. These claims are not properly before this court. See *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal.") (emphasis in original). Douglass also makes cursory references to other claims that were dismissed in the district court's May 1996 Order. Because she fails to develop these arguments in the body of her brief, we consider these issues abandoned and do not address them in this opinion. See *Justiff Aoil Co., Inc. v. Kerr-McGee Refining Corp., 75 F.3d 1057, 1067 (5th Cir. 1996)*

*II*

The district court dismissed Douglass' Bivens, ADA, retaliation, discrimination, tort (including malicious prosecution and wrongful termination), and disparate treatment claims for failure to state a claim. We review de novo a district court's dismissal for failure to state a claim under Rule 12(b)(6), applying the same standard as the district court. See General Star Indem. Co. v Vesta Fire Ins. Corp, 173 F.3d 946, 949 (5th Cir. 1999). In the same order, the court granted summary judgment in favor of the government on Douglass' Privacy Act claim. We review a grant of summary judgment de novo, applying the same standard as the district court. See Melton v. Teacher Ins. & Annuity Ass'n of America, 114, F.3d 557, 559 (5th Cir. 1997). Summary judgment is appropriate only if there is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Melton, 114 F. 3d at 559.*

The district court dismissed Douglass' First, Fourth, Fifth, Thirteenth and Fourteenth Amendment claims finding that the Civil Service Reform Act ("CSRA") was the proper avenue for redress of her constitutional claims. See *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76L.Ed.2d 648 (1983) (holding that the ability to bring a *Bivens* claim could be limited where Congress clearly intended to provide another remedy as a substitution for such suit). Douglass now argues that the district court erred in relying on *Bush* to dismiss her claims.

We have previously held that federal employees' *Bivens* claims under the First, Fourth, Fifth, Sixth, and Fourteenth amendments, are precluded by the CSRA. See *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991). Accordingly, it is clear that Douglass' First, Fourth, Fifth, and Fourteenth claims are precluded by the CSRA. *See id.* Furthermore,. we agree with the district court's application of *Bush* to bar Douglass' Thirteenth Amendment claim. While neither *Bush* nor *Rollins* considers a Bivens claim under the Thirteenth Amendment, the reasoning of these cases applies equally to such a claim in that the CSRA provides an adequate and alternative remedy for this claim. *See Bush, 462 U.S. 368, 103 S. Ct. 2404.* Similarly, the district court properly dismissed all of Douglass' non-constitutional tort claims, including her malicious prosecution claim, as barred under *Rollins. See id. At* 139-40 (holding that the existence of the CSRA prevents federal employees from bringing claims arising from their federal employment under either the Federal Tort Claims Act ("FTCA") or state law).

Additionally, Douglass has failed to state a malicious prosecution claim because she has not alleged or shown that any criminal charges were ever filed against her. *See Goodson v. City of Corpus Christi, 202 F. 3d 730, 740-41 (5th Cir. 2000); Brown v. Nationsbank Corp.*, 188 F.3d 579, 586-87 (5th Cir. 1999)(holding that under Texas law, plaintiff alleging malicious prosecution must show, inter alia, that criminal charges were filed against her).

Douglass next argues that the district court erred in dismissing her ADA claim because "Title IX is covered bgy the ADA and since the [FAA] uses federal money for education purposes...it is a covered entity for purposes of the ADA." While Douglass did allege discrimination on the basis of a physical disability, diabetes, she did not explicitly base her claim below on a violation of the AD and thus has arguably waived such a claim. However, even if she has not waived her claim, the district court's dismissal was proper because the ADA specifically excludes the United States from the definition of an "employer" See 42 U.S.C. Section 12111(5)(B)(I).

Accordingly, neither the United States nor it agencies is a covered entity under the ADA. *See id. Section 12111(2).*

Next finding that Douglass had failed to distinguish the facts supporting her discrimination claims not raised under Title VII from those supporting her Title VII discrimination claims, the district court dismissed the former category of claims. See *Jackson v. Widnall,* 99 F. 3d 710, 716 (5th Cir. 1996) ("[T]itle VII provides the exclusive remedy for employment discrimination claims raised by federal employees."); *see also Rowe v. Sullivan,* 967 F2d. 186, 189 (5th Cir. 1992) (holding that claims for relief under 42 U.S.C. Section 1981, 1983 and 1985 arising from the same set of facts as Title VII claims were barred). On appeal, Douglass fails to argue, let alone prove, that there is any independent basis for her non-Title VII discriminations claims. Accordingly, the district court's dismissal was proper. *See Jackson, 99 F.3d at 716.*

The district court also dismissed most of Douglass' discrimination claims raised under Title VII for failure to exhaust administrative remedies, failure to wait 180 days after filing the complaint with the FAA before filing in federal court, or refusal to seek relief under the proper statutory provision. On appeal, with respect to the dismissed title VII claims based on complaints filed in October 1993, Douglass fails to even argue that she did in fact exhaust her administrative relief by contacting an EEO Counselor within forty-five days of the alleged discriminatory conduct. Isee 19 C.F.R. Section 1614.105; Wilson v. Sec. Dep't of Veterans Affairs, 65 F. 3d 402, 404 (5th Cir. 1995). Similarly, Douglass fails to argue or show that the district court erred in determining that she failed to wait the required 180 days after filing four complaints in 1994 before filing suit in federal court.

Finally, Douglass fails to explain why her claim of racial discrimination was properly filed under 42 U.S.C. Section 2000a-6 (addressing racial discrimination in public-places) rather than Section 20003-16 as instructed by the district court. In short, Douglass fails to provide any evidence or argument that

the district court erred in dismissing all but two of her Title Vii claims.

Since the district court did not dismiss Douglass' Title VII claims based on whistleblowing activity and gender, we consider their dismissal as part of the district court's subsequent dismissal under Rule 41(b).

Finally, Douglass argues that the district court erred in granting summary judgment on her Privacy Act claim arising out of the FAA;s disclosure of her phone call to that agency's complaint hotline.

In 1988, Douglass phoned the FAA complaint hotline to report purported criminal activities by the manager of the Airway Facilities Division. The FAA subsequently circulated two internal memoranda that identified Douglass' allegations and hotline control number but not her name. Shortly thereafter, the Fort Worth Star-Telegram printed two stories discussing the investigation into the allegations, but also not identifying Douglass' name.

On appeal, Douglass argues that her call to the FAA hotline was a protected record under the Privacy Act and that the FAA's disclosure of her hotline control number was a violation of that act. See 4 U.S.C. Section 552a, et seq. We agree with the district court that Douglass' Privacy Act claim lacks merit because the disclosed information was not "about" her. See *Tobey v N.L.R.B., 40 F.3d* 469, 471 (D.C. Cir. 1994).

As an initial matter, because only agencies may be sued under the Act, the court properly dismissed Douglass' Privacy Act claim against the individual defendants. *See Petrus v. Bowen, 833 f.2d 581, 582-83.*

Additionally, the FAA;s use of the hotline information fell under the "routine use" exception to the Privacy Act because the information was used to investigate the person against whon Douglass made allegations of impropriety. See 5 U.S.C. Section 552a(a)(7) (defining "routine use" as "the use of such record for a purpose which is compatible with the purpose for which it was collected); 5 U.S.C. Section 552a(b)(3) (permitting disclosure of

record if it would be for a routine use as defined in Section 552a(a)(7)).

IV

Finally, Douglass argues that the district court erred in dismissing the remainder of her action for failure to obey court orders. We review the dismissal of an action under Rule 41(b) for abuse of discretion. See *Larson v. Scott*, 157 F.3d 1030, 1032 (5th Cir. 1998).

Dismissal with prejudice under Rule 41(b) is an extreme sanction, and, accordingly, we have "consistently refused to permit a court to impose this sanction unless the history of a particular case discloses both (1) a clear record of delay or contumacious conduct by the plaintiff, and (2) that a lesser sanction would not better serve the interest of justice." *McNeal v. Papasan*, 842 F.2d 787, 790 (5th Cir. 1988) (citations omitted). This strict standard has been satisfied here. Douglass was allowed to file numerous amended complaints. The district court, conscious of Douglass' pro se status, has repeatedly instructed her as to what to include, and what not to include, in her pleadings so as to produce a comprehensible complaint. Douglass has routinely disregarded these instructions. The district court was well within its discretion in determining that Douglass' actions – including filing her page-limited complaints in noticeably small typeface and attaching as exhibits lengthy factual recitations – evidenced an "attempt to escape the requirements imposed upon her by the Court." It also properly noted that despite the court's numerous efforts to accommodate her, Douglass refused to comply with its orders and, consequently, caused undue delay and exhibited bad faith. We too are cognizant of Douglas' pro se status. Nonetheless, given the lengthy delay that Douglass has caused, the prejudice to the government in not having a sufficient complaint to answer, and the evidence that lesser sanctions would not have been effective,

For example, despite the fact that Douglass was previously warned that dismissal was possible if she did not

adequately plead her cause o action, she nonetheless repeatedly failed to do so.

The district court's dismissal of the action under Rule 41(b) was not an abuse of discretion. See *Price v. McGlathery*, 792 F.2d 471, 474-75 (5th Cir. 1986).

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.

**APPENDIX 2**

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION**

1. September 17, 1999 Order to Dismiss Fourth Amended Complaint under Rule 41(b)

2. November 18, 1998 Order Granting Motion for Leave to File Fourth Amended Complaint

3. September 14, 1998 Order Resolving All Pending Motions and Order for Plaintiff to File an Amended Complaint

4. March 10, 1997 Order Denying Request for Partial Certification

5. January 24, 1997 Order Denying Motion for Rule 54(b) Certification of the Court's May 21 Order

6. January 16, 1997 Order Denying Motion to Investigate and Confiscate

7. September 23, 1996 Order Denying Motion for Reconsideration of May 21, 1996 Order

8. May 21, 1996 Memorandum Opinion and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

Now before the Court is Defendant's motion entitled "Defendant's Motion to Dismiss Plaintiff's Fourth amended Complaint Under Rule 41(b); Alternatively, Motion to Dismiss Under Rule 12(b)(6), For Failure to State a Claim." Plaintiff has filed a response, and Defendant has filed a reply thereto. After careful review of the record, the submissions of the parties and the applicable law, the Court makes the following determination.

I. BACKGROUND

For purposes of clarification, the record reflects that Plaintiff has filed and or submitted the following six pleadings in this cause of actioon: (1) Plaintiff's May 23, 1994 Oriinal Complaint; (2) Plaintiff's July 18, 1994 First Amended Complaint; (3) Plaintiff's May 27, 1997 Second Amended Complaint; (4) Plaintiff's February 3, 1998 Proposed Third Amended Complaint; (5) Plaintiff's November 3, 1998 Third Amended Complaint;' and (6) Plaintiff's November 17, 1998 Fourth Amended Complaint.

After defendant moved for Plaintiff's Second Amended Complaint to be dismissed in its entirety, or in the alternative, that Plaintiff should be ordered to plead, yet again, with particularity, Plaintiff filed a motion for leave to file a Third Amended Complaint. Defendant opposed Plaintiff's motion for leave to file Third Amended Complaint, claiming that Defendant remained unable to formulate a congent response to the Plaintiff's proposed Third amended Complaint. The Court noted glaring deficiencies in Plaintiff's proposed third mended Complaint and Plaintiff's amended complaint of record, which was Plaintiff's Second Amended Complaint. In deference to Plaintiff's pro se status, the Court denied Defendant's motion to

dismiss and granted Plaintiff an opportunity to amendher complaint to state with particularity and specificity her remaining claims in this cause of action. See Court's September 14, 1998 Order. The Court's September 14, 1998 Order (hereinafter "Court's Order") directed Plaintiff to file a new third amended complaint if she wished to proceed with this cause of action. Id. The Court's Order stated inter alia:

Finding that Plaintiff's proposed third amended complaint fails to remedy deficiencies of the second amended complaint, and finding the futility of proceeding with an amended complaint which reasserts dismissed claims and complicates an analysis of the issues, the court hereby DENIES Plaintiff's motion for leave to file her proposed third amended complaint.

The Court having denied Plaintiff's motion for leave to file her proposed third amended complaint, Plaintiff's Second Amended Complaint is still the pleading of record. Given the extent of unnecessary redundant, and immaterial information contained in Plaintiff;s Second Amended Complaint, the Court agrees with Defendant that Plaintiff's Second Amended Complaint contains glaring deficiencies. If the Complaint is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised, " it is within the discretion of the court to dismiss the complaint or order it amended. James Wm. Moore et al., 2A Moore's Federal Practice Paragraph 12.27(3) (3rd. Ed. 1997). The Court recognizes that a pro se plaintiff's pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L. Ed. 2d 652 (1972). Because Plaintiff is proceeding pro se, and in light of Plaintiff's motion for clarification, the Court shall DENY at this time Defendant's motion to dismiss. Moreover, the court shall grant Plaintiff an opportunity to amend her complaint to state with particularity and specificity her remaining claims in this cause of action. Plaintiff's amended complaint shall set forth a short, plain statement of her remaining claims against Defendant.

Court's September 14, 1998 Order at 6-7. The Court went so far as to delinate the remaining eight claims available to Plaintiff which had not been dismissed or had summary judgment granted and set forth specific requirements for her pleading. Id. At 8, 10-11. Upon Plaintiff's filing of her new Third Amended complaint as directed by the court, Plaintiff filed a motion for leave to file her Fourth Amended Complaint, which the Court granted Plaintiff leave to file.

## II. DISCUSSION

Defendant now seeks to dismiss with prejudice under Fed.R.Civ.P. 41(b) Plaintiff's Fourth Amended Complaint due to Plaintiff's willful failure to comply with the repeated orders of the court.

Rule 41(b) of the Federal rules of Civil Procedure states: "For failure of the plaintiff to prosecute or to comply with tese rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. . Unless the Court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than dismissal or lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudiction upon the merits." Fed.R.Civ.P. 41(b) (emphasis added).

Defendant complains that Plaintiff's Fourth Amended Complaint contains claims that theCourt previously dismissed with prejudice, as well as including a lengthy and cumbersome summary of factual allegations which do not specifically relate to Plaintiff's remaining claims.

Plaintiff's constitutional and non-constitutional tort claims were dismiossed with prejudice in the Court's May 21, 1996 Order, and the court's September 14, 1998 Order directed Plaintiff that she was "expressly ordered not to include in her forthcoming amended complaint those claims which the Court has dismissed with prejudice or granted summary judgment to

Defendant in this cause of action." Court's September 14, 1998 Order at 7. Despite the court's directions, Plaintiff's Fourth Amended Complaint contains constitutional claims for allefged deprivation of freedom of speech, equal protection, due process and right to privacy, as well as tort claims for defamation and personal injruy. See Plaintiff's Fourth Amended Complaint at 12-13.

The Court also ordered Plaintiff to include only specific factual allegations relating to specific claims in her amended complaint and to avoid rreciting the lengthy 28 pages of factual allegations set forth in Plaintiff's proposed third amended complaint, much of which is unnecessary, immaterial and relates to claims previously dismissed. See court's September 14, 1998 Order. Instead of a short, plain statement of the factual allegations, Plaintiff's previous complaints had contained lengthy narrative statements of facts which mixed allegations of relevant and irrelevant facts in such a fashion as to make it difficult to ascertain factual allegations relating to specific claims. For example, Plaintiff's proposed Third Amended Complaiint, which was 36 pages in length, contained a "Statement of Facts" section which consisted of 28 pages.

The Court's Order directed Plaintiff, inter alia as follows:

Plaintiff's amended complaint should containa brief statement of specific factual allegatiions relating only to Plaintiff's remaining claims against Defendant. Upon an analysis of the claims in Plaintiff's forthcoming amended complaint, a review of Plaintiff's factual allegations should only contain those facts pertinent to and necxessary to support Plaintiff's remaining claims, not to those claims previously dismissed with prejudice or the claim on which summary judgment was granted by the Court.

Court's September 14, 1998 Order at 8-9. In addition, Plaintiff was cautioned that:

An amended complaint entirely supersedes and takes the place of an original pleading, rendering the original complaint and any amended complaints of no legal effect. See Clark v. Tarrant County, 798 F. 2d 736, 740 (5th Cir. 1986); Boelens v. Redman Homes, Inc., 759 F.2d 504, 508 (5th Cir. 1985). Thus, Plaintiff is advised that once an amended complaint is filed, the Court will look only to that document as the proper complaint in reviewing Plaintiff's claims. Plaintiff's amended complaint cannot reference or rely on information contained in previous amendments filed in this cause of action.

Id. At 7. Due to Plaintiff's history of lengthy and cumbersome pleading, Plaintiff was also ordered to limit her amended complaint to twenty five pages, exclusive of exhibits or attachments. Id. At 11.

Rather than following the court's Order to include a more concise statement of facts, Plaintiff obstinately included in her Fourth Amended Complaint all the factual allegations of her proposed Third Amended Complaint, even though many of the factual allegations relate to claims previously dismissed by the Court. Moreover, Plaintiff attempted to skirt the Court's direct order to limit her complaint to 25 pages and to include only specific factual allegations relating to specific claims. Indso doing, laintiff altered the font point size of the pages of her Fourth Amended Complaint in order to reduce the typeface and include more text on each page. Although Plaintiff included a one and one-half page statement of facts in the body of her Fourth Amended Complaint, Plaintiff also attached to her amended complaint an exhibit entitled "Facts of the Case" consisting of 8 pages of single-spaced, small print 56 paragraphs of factual allegations. These factual allegations, almost verbatim to the double-spaced 28 pages of factual allegations contained in Plaintiff's proposed Third Amended Complaint, are not specifically tailored to Plaintiff's remaining claims, but instead include the "whole picture" as told by Plaintiff. Moreover, Plaintiff was expressly ordered to avoid reciting the lengthy 28 pages of factual allegations set forth in her proposed

third Amended Complaint because the Court had previously reviewed these factual allegations and found them to contain too much irrelevant material. Id. At 8-9.

Plaintiff incorporates her exhibit of factual allegations "as if fully set forth" in her fourth Amended Complaint. See generally Plaintiff's Fourth Amended Complaint at 3. Specifically, Plaintiff makes the following references to this exhibit of factual allegations attached as Exhibit 8:

(a) from count 1, page 3: "From Exhibit 8 paragraphs [22-23, 27, 30-33, and 56] from the Statement of Facts are realleged and incorporated as if fully set forth here." Plaintiff makes similar statements incorporating her Statement of Facts, Exhibit 8, in the Following: Count 3, page 7; Count 5 page 9; Count 7, page 10; Count 8, page 11; Count 9, page 11; Count 10, page 12;

(b) from "Summary of Nature Case and Facts," page 3: "For complete details about the nature of the case and facts, see Exhibit 8, and those paragraphs related to tin the 12 Counts below are fully incorporated here as if fully set forth for all purposes at law;"

© from Footnote 3, page 4: "All exhibits set forth in this amended complaint are made a part of the complaint for all purposes at law."

Plaintiff's Fourth Amended Complaint at 3-4 (emphasis added). By incorporating the same lengthy summary of factual allegations which the Court expressly cautioned Plaintiff not to do, Plaintiff has demonstrated a conscious disregard of the Court's Order to plead only necessary, pertinent, and related facts. In addition, Plaintiff has evidenced a contumacious attempt to escape the requirements imposed upon her by the Court.

In his motion to dismiss Plaintiff's Fourth amended complaint, Defendant goes on to argue:

Plaintiff's Fourth Amended Complaint is so extensively filled with unnecessary, redundant, and immaterial information that it remains as confusing, ambiguous, vague, and unintelligible as her pervious complaints. Its true substance, if

any it has, is so disguised that the Court should dismiss the Complaint. 2 Moore's Federal Practice paragraph 12.37[3] (3rd Ed. 1998). In as much as Plaintiff has been given three previous chances and has intentionally ignored the Court's mandates regarding the content of her complaint, the court should strike her Fourth Amended Complaint and dismiss her cause of action, with prejudice, under Fed. R. Civ. P 41(b).

Defendant's Motion to Dismiss at 7. Thus, Defendant seeks to dismiss Plaintiff's Fourth Amended Complaint and her cause of action en toto pursuant to Fed.R.Civ.P. 41(b).

Rule 41(b) of the Federal Rules of Civil Procedure provides, iin pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant ... [A] dismissal under this subdivision ... operates as an adjudication upon the merits."

Fed.R.Civ.P,. 41(b). Rule 8(a) of the Federal rules of civil Procedure provides inter alia that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint which violates Rule 8 may be dismissed when it is "so verbose, confused and redundant that its true substance, if any, is well disguised." Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965), cert. Denied, 382 U.S. 966, 86 S.Ct. 458 (1965); Lowery v. Hauk, 422 F.Supp. 490 (C.D. Cal. 1976). If the complaint is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised," it is within the discretion of the court to dismiss the complaint or order it amended. James Wm. Moore et al., 2 A Moores Federal Practice paragraph 12.27[3] (3rd. Ed. 1997). In an analogous fashion, substantial and valid reasons for which to refuse to allow the filing of an amended complaint include, inter alia, futility, undue delay, bad faith and repeated failure to

amend. See Leffall v. Dallas Indep. School District, 28 F. 3d 521, 524 (5th Cir. 1994); Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 546 (5th Cir. 1983).

In order to fully understand the tedious history of this case, one must consult the voluminous record in this cause of action. It is generous to say that this cause of action has already had a long and labored history, and it is still in the pleading stage. After six complaints, amended complaints or proposed amended complaints. (See supra p.1.) the Court finds that Plaintiff has still not plead her cause of action sufficiently. Defendant hs yet to file an Answer to Plaintiff's complaint in this five-year old case. Regardless of the rulings and instructions of this Court, Plaintiff Douglass is determined to run her lawsuit as she sees fit. After the court delineated Plaintiff's remaining claims, Plaintiff has once again plead claims which had been dismissed with prejudice, but which she steadfastly clings to and is determined to litigate. Plaintiff has disregarded the Court's instructions to limit her factual summary to onl6y those specific factual allegations relating to Plaintiff's remaining claims. Plaintiff has included her recital of the factual allegations, no matter how lengthy, in her amended complaint, flying directly in the face of the court's order. Plaintiff has blatantly attempted to circumvent the court's order by slipping in through the backdoor her lengthy recital of the factual allegations as an exhibit to her complaint Plaintiff has played with the font and size of her document in order to squeeze in all that she wishes, regardless of the court's order to restrict her pleading to 25 pages. Plaintiff has attempted to preserve within each new amended complaint her objections to the court's adverse rulings, as if noting these objections will miraculously grant her judgment on subsequent appeal.

Plaintiff "does hereby state that all her claims filed in this cause of action including this Fourth Amended Complaint are subject to final decision on appeal." Plaintiff's Fourth Amended Complaint at 1.

The Court recognizes that a pro se plaintiff's pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Even with the less stringent standard, Plaintiff has exhausted the patience of the Court. This court has gone to great lengths to accommodate Plaintiff, allowing her to repeatedly amend her complaint due to deficiencies contained within each complaint, granting her eight extensions of time in which to file her pleadings, and providing her with specific instructions and requirements for filing her Fourth Amended Complaint. See Court's September 14, 1998 Order.

The Court determines that Plaintiff's repeated failure to properly plead or amend her cause of action and failure to comply with the Court's orders has caused undue delay and is evidence of bad faith. Furthermore, the court finds that Plaintiff has failed to comply with the orders of this court, specifically the Court's September 14, 1998 Order, such that Plaintiff's cause of action should be dismissed pursuant to Fed. R.Civ.P,. 41(b). Holloway v. United States, 734 F.2d 506 (10th Cir. 1984) (where plaintiff had opportunity to comply with court's order but flagrantly ignored such order, Rule 41(b) dismissal with prejudice was proper); Mhenry v. Rene, 84 F.3d 1172 (9th Cir. 1996); Beanal v. Freeport-McMoran, 1998 U.S. Dist. LEXISA 2522 (E.D. La. March 3, 1998).

Accordingly, the Court finds that pursuant to Fed.R.Civ.P. 41(b) "Defendant's Motion to Dismiss Plaintiff's Fourth Amended Compalint under rule 41 (b)" should be GRANTED. A dismissal pursuant to Fed.R.Civ.P. 41 (b) operates as an adjudication upon the merits.

## CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Defendant's Motion to Dismiss Plaintiff's Fourth Amended Complaint Under Rule 41(b) is GRANTED. Because a dismissal pursuant to Fed.R.Civ,.P. 41(b) operates as an adjudication upon the merits, Plaintiff's cause of action is hereby DISMISSED WITH PREJUDICE.

Signed this 17th day of September, 1999.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

Now before the Court is Plaintiff's motion for leave to file a fourth amended complaint, filed on November 17, 1998.

By Order of the Court of September 14, 1998, pro se

Plaintiff was ordered to file an amended complaint

In the September 14, 1998 Order, the Court denied Plaintiff's motion for leave to file her proposed third amended complaint, as well as denying Defendant's motion to strike certain aspects of Plaintiff's second amended complaint, Defendant's motion for a more definite state, and Defendant's motion to dismiss. The Court opined that existed a "futility of proceeding with... [the second] amended complaint which reasserts dismissed claims and complicates an analysis of the issues." Court's September 14, 1998 Order at 6.

Stating with particularity and specificity her remaining claims in this cause of action on or before October 12, 1998.

Plaintiff's filing deadline of October 12, 1998 was a federal holiday, therefore, the deadline for Plaintiff to file her amended complaint was extended to October 13, 1998. Court's September 23, 1998 Order.

Although expressly cautioned concerning extensions of time,

See Court's September 134, 1998 Order at 11.

And four days before the deadline to file the amended complaint, Plaintiff filed an unopposed motion for extension of time in

which to file her amended complaint, complaining of computer damage from a storm on October 1, 1998. The Court granted Plaintiff's motion for extension, extending her deadline seventeen days to the requested date of October 30, 1998. Court's October 13, 1998 Order.

On October 17, 1998 Plaintiff filed yet another motion for extension of time in which to file an amended complaint. As good cause for the extension, Plaintiff alleged that her insurance claim for damage from the storm, including damage to her computer, had not yet been resolved, nor had her computer been repaired. The Court extended Plaintiff's deadline to file her amended complaint until November 3, 1998. Court's October 27, 1998 order.

Via telephone on November 3, 1998, Plaintiff complained to the Court that she did not have sufficient time to file her amended complaint by the November 3, 1998 extended deadline. Plaintiff informed the Court that, in her opinion, she was being forced to file an incomplete and rushed amended complaint, but that she wanted to supplement her amended complaint in the near future.

Plaintiff has now filed a motion for leave to file a fourth amended complaint, filed on November 17, 1998. Defendant is unopposed to Plaintiff's motion for leave to file a fourth amended complaint. Having considered the motion, the Court is of the opinion that the motion should be granted.

Accordingly, it is ORDERED that Plaintiff's motion for leave to file a fourth amended complaint is hereby GRANTED. It is further ORDERED that Plaintiff's fourth amended complaint shall be deemed filed on November 17, 1998. Due to the age of this case, having been filed over four years ago, and the numerous extensions of time which have been branted, the parties are on notice that no further extensions of time or delays shall be allowed.

Signed this 18th day of November, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

# ORDER

## ORDER RESOLVING ALL PENDING MOTIONS AND ORDER FOR PLAINTIFF TO FILE AN AMENDED COMPLAINT

Pending before the Court are "Defendant's Preanswer Motion to Strike Certain Aspects of Plaintiff's Second amended Complaint, with Motion to Dismiss and Motion for More Definite Statement" and Plaintiff's motion for leave to file a third amended complaint. Plaintiff has also filled a motion for clarification of the Court's May 21, 1996 Order dismissing most of Plaintiff's claims and granting Defendant summary judgment on one claim.

## I. BACKGROUND

Douglass filed a complaint against the Department of Transportation, Federal Aviation Administration ("'AA'", and numerous individuals within the FAA. Plaintiff alleged that during the course of her employment with the FAA she was subjected to discrimination of various forms, unconstitutional and tortious actions were taken against her, and her rights under the Privacy Act were violated. By Order of this Court on May 31, 1996, the Court dismissed most of Plaintiff's claims, some with prejudice and some without prejudice, and granted the government summary judgment on one claim. See Court's May 21, 1996 Order. Plaintiff was ordered to file an amended complaint, to the extent with which she wished to proceed with this action, on her "remaining Title VII claims alleging sex-based-discrimination and discriminatory reprisal arising from her suspension on March 29, 1993" and her Title VII discrimination claims

*[Plaintiff was allowed to re-plead these claims if she could establish exhaustion of administrative remedies in regards to the claims. Court's May 21, 1996 Order at 20.]*

against Secretary Pena which the Court dismissed without prejudice as being premature "because Douglass filed a claim in this Court before 180 days had run from the filing of her Title VII complaint." Id. At 19-20.

Plaintiff filed her second amended complaint on May 27, 1997. Subsequently, Defendant filed a motion to strike the second amended complaint, motion for a more definite statement, and motion to dismiss the complaint. Defendant complains that Plaintiff's Second Amended Complaint is a "shotgun pleading" that fails to allow Defendant to form a responsive pleading under Fed.R.Civ.P 12(e) and fails to comport with requirements of Fed. R.Civ.P. 8(a)(2) and Fed.R.Civ.P. 10(b). See Defendant's Preanswer Motion to Strike Certain Aspects of Plaintiff's Second Amended Complaint, with Motion to Dismiss and Motion for More Definite Statement. Defendant argues that Plaintiff's Second Amended Complaint should be dismissed in its entirety, or in the alternative, that Plaintiff should be ordered to plead, yet again, with particularity and within the bounds set forth in the Court's May 21, 1996 Order. Id.

In response to the above-referenced motions of Defendant, Plaintiff has filed a motion for leave to file a third amended complaint to cure any defects in the Second Amended Complaint and overcome Defendant's motions to strike or dismiss Plaintiff's Second Amended Complaint. After reviewing the record, the submissions of the parties and the applicable law, the Court makes the following determinations.

## II. DISCUSSION

Defendant has moved to strike a substantial portion of Plaintiff's Second Amended Complaint and moved for the Court to order a more definite statement from Plaintiff. The Court agrees with Defendant that Plaintiff's Second Amended Complaint is confusing. Plaintiff's Second Amended Complaint

contains irrelevant and impertinent information interlaced with possible valid claims. Rendering the complaint virtually incomprehensible to an analysis of the proper claims. In addition, Plaintiff has incorporated claims which have been dismissed with prejudice

*Dismissal with prejudice is defined as an "adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause... [I]t is res judicata as to every matter litigated." Black's Law Dictionary 469 (6th ed. 1990). Therefore, Plaintiff's claims which have been dismissed with prejudice by the Court have been considered finally eliminating the claims and acting as a bar for Plaintiff to re-plead the claims.*

By the Court in this cause of action. See Court's May 21, 1996 Order. With respect to any proper remaining claims in Plaintiff's Second Amended Complaint, the court finds it necessary for Plaintiff to amend her complaint.

Plaintiff filed her motion for leave to file a third amended complaint in an attempt to overcome Defendant's objections to Plaintiff's Second Amended Complaint:

To specifically answer each allegation made in Defendant's Preanswer Motion to Strike Certain Aspects of plaintiff's Second Amended Complaint, with Motion [sic] to Dismiss and Motion for More Definite Statement with Memorandum Brief would be a waste of time. I have offered a solution to resolve this case is [sic] an efficient, expedient manner, if the Court is willing to readdress plaintiff' claims previously dismissed [and grant leave to file third amended complaint]...

Plaintiff's Objection and Answer to Defendant's Motions to Strike, Dismiss, and More Definite Statement at 7. However, Plaintiff's proposed third amended complaint still contains claims which the Court previously dismissed with prejudice in this cause of action. See Court's May 21, 1996 Order. Plaintiff srgues that:

New-found laws would affect counts that were dismissed by the Court May 21, 1996... [T]he Court should Order a Third Amended [C]omplaint, but to include updated law that could cure most of the dismissal action, taken by the Court about her First Amended [c]omplaint, with the Second Amended [c]omplaint replaced by the Third Amendment curing Fed. R.Civ.P. 12(b)(1).

Plaintiff's objection to Defendant's Preanswer Motion to Strike at 1-2. Plaintiff claims that her research for her response to Defendant's motion to strike, motion to dismiss and motion for more definite statement lead her to laws that allegedly were not published in Title 42 U.S. C. Section 2000 et. Seq. when Plaintiff filed her original complaint on May 23, 1994 or her First Amended Complaint on July 18, 1994. Plaintiff, who fails to cite what these "new-found laws" are, argues these laws are sufficient grounds to allow her leave to file a third amended complaint and re-assert those claims dismissed with prejudice by the Court. Plaintiff" objection to Defendant's Preanswer Motion to Strike at 1-2. Plaintiff alleges that these "new-found laws" were unavailable to her when she filed her First Amended Complaint in 1994 and would affect [positively] claims dismissed by the Court on May 21, 1996. However, Plaintiff fails to cite what these "new-found laws" are or the date of their enactment.

Additionally, Plaintiff fails to provide any reason hat she did not include them in her May 23, 1994 Original Complaint or July 18, 1994 first amended complaint. Plaintiff's argument does not cause the Court to question its May 21, 1996 Order.

Defendant opposes Plaintiff's motion for leave to file third amended complaint, claiming that Defendant remains unable to formulate a cogent response to the Plaintiff's proposed third amended complaint. Defendant argues that by attempting to re-plead all of Plaintiff's original allegations, including those which had previously been dismissed with prejudice, the proposed third amendment obfuscates the issues rather than helps to facilitate a

decision on the merits. Defendant's Response in Opposition to Plaintiff's Motion for Leave to File Her Third Amended complaint at 2.

Substantial and valid reasons for which to refuse to allow the filing of an amended complaint include, inter alia, futility, undue delay, bad faith and repeated failure to amend. See Leffall v. Dallas Indep. School District, 28 F.3d 521, 524 (5th Cir. 1994); *Wedgeworth v. Fibreboard Corp.*, 706, F.2d 541, 546 (5th Cir. 1983). Finding that Plaintiff's proposed third amended complaint fails to remedy deficiencies of the second amended complaint, and finding the futility of proceeding with an amended complaint which reasserts dismissed claims and complicates an analysis of the issues, the Court hereby DENIES Plaintiff's motion for leave to file her proposed third amended complaint.

The Court having denied Plaintiff's motion for leave to file her proposed third amended complaint, Plaintiff's Second amended Complaint is still the pleading of record. Given the extent o unnecessary, redundant, and immaterial information contained in Plaintiff's Second Amended Complaint, the court agrees with Defendant that Plaintiff's Second Amended Complaint contains glaring deficiencies. If the complaint is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised," it is within the discretion of the court to dismiss the complaint or order it amended. James Wm. Moore et al., 2A Moore's Federal Practice . paragraph 12.27(3) (3rd. Ed. 1997). The Court recognizes that a pro se plaintiff's pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21 92 S.Ct. 594, 30 L. Ed.2d 652 (1972), Because Plaintiff is proceeding pro se, and in light of Plaintiff's motion for clarification, the Court shall DENY at this time Defendant" motion to dismiss. Moreover, the Court shall grant Plaintiff an opportunity to amend her complaint to state with particularity and specificity her remaining claims in this cause of action. Plaintiff's amended

complaint shall set forth a short, plain statement of her remaining claims against Defendant.

An amended complaint entirely supersedes and takes the place of an original pleading, rendering the original complaint and any amended complaints of no legal effect. See Clark v. Tarrant County, 798 F.2d 736, 740 (5th Cir. 1986); Boelens v. Redman Homes, Inc., 759 F. 2d 504, 508 (5th Cir. 1985). Thus, Plaintiff is advised that once an amended complaint is filed, the Court will look only to that document as the proper complaint in reviewing Plaintiff's claims. Plaintiff's amended complaint cannot reference or rely on information contained in previous amendments filed in this cause of action. However, Plaintiff need not include claims previously dismissed with prejudice or granted summary judgement by the Court in this cause of action.

A review of Plaintiff's Second Amended Complaint and Plaintiff's proposed third amended complaint reveals that many of the claims Plaintiff asserts have been disposed of by the Court. See Court's May 21, 1996 Order. Therefore, Plaintiff is expressly ordered not to include in her forthcoming amended complaint those claims which the Court has dismissed with prejudice or granted summary judgment to Defendant in this cause of action.

From review Plaintiff's amended pleadings, it is appears to the Court that Plaintiff is relying on mistaken belief that, in order to preserve the claims for appeal, she must include in the amended complaint those claims which the Court previously dismissed with prejudice or granted summary judgment in favor of Defendant. See Plaintiff's Second amended complaint at 2. This belief is false. Plaintiff may appeal the claims dismissed by this Court upon a final decision by the Court in this cause of action.

Specifically, Plaintiff's only remaining claims in this cause of action are the following:

(i) Title VII claim based on the June 1, 1993 administrative complaint alleging discrimination on the basis of sex;

(ii) Title VII claim based on the June 1, 1993 administrative complaint alleging discrimination on the basis of reprisal for whistle-blowing activities;

(iii) Title VII claim based on the March 15, 1994 administrative complaint alleging discrimination based on sex;

(iv) Title VII claim based on the March 15, 1994 administrative complaint alleging discrimination based on reprisal;

(v) Title VII claim based on the April 20, 1994 administrative complaint alleging discrimination based on sex;

(vi) Title VII claim based on the April 20, 1994 administrative complaint alleging discrimination based on reprisal;

(vii) Title VII claim based on the May 2, 1994 administrative complaint alleging sexual harassment by Ernst; and

(viii) Title VII claim based on the May 10, 1994 administrative complaint alleging sexual harassment by Halliburton.

For claims (iii) through (viii), Plaintiff must establish that she has exhausted her administrative remedies in regards to these claims.

Plaintiff's forthcoming amended complaint must also contain specific factual allegations relating to specific claims, but need not contain the lengthy twenty-eight pages of factual allegations set forth in Plaintiff's proposed third amended complaint. Plaintiff's amended complaint should contain a brief statement of specific factual allegations relating only to Plaintiff's remaining claims against Defendant. Upon an anlysis of the claims in Plaintiff's forthcoming amended complaint, a review of Plaintiff's factual allegations should only contain those facts pertinent to and necessary to support Plaintiff's remaining claims, not to those claims previously dismissed with prejudice

or the claim on which summary judgment was granted by the Court.

Thus, after the filing of Plaintiff's original complaint, two amended complaints and a proposed third amended complaint, several pre-answer motions by Defendant, and numerous extensions of time, motions for reconsideration and appeals of this Court's orders, this cause of action is still at the pleading stage. In a concerted effort to proceed past this impasse, the Court hereby ORDERS the following:

(1) if Plaintiff desires to pursue her remaining claims, as set forth by the Court in this Order, she shall file an amended complaint

Since the court is ordering Plaintiff to file an amended complaint, Plaintiff need not file a motion for leave to file an amended complaint. The court, as per this order, denies the pending Plaintiff's Motion for Leave to File Third Amended Complaint, thus Plaintiff's Second Amended Complaint is the complaint of record. Plaintiff's forthcoming amended complaint, as ordered herein by the Court to be filed on or before October 12, 1998, shall be entitled "Plaintiff's Third Amended Complaint.".

Entitled "Plaintiff's Third Amended Complaint" with the Clerk of the Court no later than 4:30 p.m. on or before October 12, 1998. Plaintiff shall serve Defendant's counsel with a true and correct copy of the amended complaint by placing same in the mail no later than October 12, 1998. Failure to timely file the required amendment may result in the dismissal of Plaintiff's claims without further notice;

(2) Defendant shall have twenty days from the date of Plaintiff's filing within which to answer or otherwise respond to Plaintiff's amended complaint. Failure to timely respond to Plaintiff's amended complaint may result in a default judgment being granted against Defendant;

(3) the amended complaint shall contain, inter alia, a brief statement of jurisdiction, a summary of the factual allegations, a section setting forth the remaining claims for relief, a section setting forth the specific relief requested, and the requisite certificates of conference and service;

(4) the amended complaint shall not contain any claims which the Court has previously dismissed with prejudice or granted summary judgment to Defendant in this cause of action. Plaintiff's only remaining claims against Defendant in this cause of action are:

(ix) Title VII claim based on the June 1, 1993 administrative complaint alleging discrimination on the basis of sex;

(x) Title VII claim based on the June 1, 1993 administrative complaint alleging discrimination on the basis of reprisal for whistle-blowing activities;

(xi) Title VII claim based on the March 15, 1994 administrative complaint alleging discrimination based on sex;

(xii) Title VII claim based on the March 15, 1994 administrative complaint alleging discrimination based on reprisal;

(xiii) Title VII claim based on the April 20, 1994 administrative complaint alleging discrimination based on sex;

(xiv) Title VII claim based on the April 20, 1994 administrative complaint alleging discrimination based on reprisal;

(xv) Title VII claim based on the May 2, 1994 administrative complaint alleging sexual harassment by Ernst; and

(xvi) Title VII claim based on the May 10, 1994 administrative complaint alleging sexual harassment by Halliburton.

For claims (iii) through (viii), Plaintiff must establish that she has exhausted her administrative remedies in regards to these claims.

(5) the amended complaint shall contain only those factual allegations which are necessary, pertinent, and relate specifically to Plaintiff's remaining claims against Defendant;

(6) due to Plaintiff's previous lengthy pleadings, Plaintiff's amended complaint shall not exceed twenty-five pages. The twenty-five page limit is exclusive of any exhibits or attachments, if necessary, to Plaintiff's amended complaint;

(7) no extension of time for either party shall be granted without good cause. Due to Plaintiff's history

A review of the record reveals that Plaintiff has filed motions for, and been ranted, eight extensions of time.

in this case of filing motions for extension of time, Plaintiff is expressly advised that the mere occurrence of filing a motion for extension of time, unless granted by the Court, will not act to toll the time in which to file the amended complaint. Plaintiff should be prepared to file her amended complaint on or before the deadline, October 12, 1998, unless she can show the Court good cause as to why an extension of time should be granted; and

(8) failure to timely and completely comply with the terms of this Order may result in the dismissal of Plaintiff's claims without further notice.

## CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Defendant's Motion to Strike Certain Aspects of Plaintiff's Second Amended Complaint is DENIED.

It is further ORDERED that Defendant's Motion to Dismiss is DENIED at this time.

It is further ORDERED that Defendant's Motion for More Definite Statement is DENIED.

It is further ORDERED that Plaintiff's motion for leave to file third amended complaint is hereby DENIED without prejudice to Plaintiff's right to file an amended complaint, in accordance with this Order, on or before October 12, 1998. If Plaintiff desires to pursue her remaining claims, set forth in this Order, she shall file a pleading entitled "Plaintiff's Third Amended Complaint," alleging with particularity and specificity Plaintiff's remaining claims against Defendant and the specific factual allegations which are necessary to support the remaining claims. Plaintiff shall file her amended complaint no later than 4:30 p.m. on or before October 12, 1998. Failure to timely file the required amendment, or completely comply with the terms of this Order, may result in the dismissal of Plaintiff's claims without further notice.

It is further ORDERED that Plaintiff's Motion for Clarification is rendered MOOT by this Order.

Signed this 14h day of September 1998.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

Before the Court is plaintiff Janet Douglass' motion for reconsideration of the Court's order denying her request for a partial certification under Fed.R.Civ.P. ("Rule") 54(b). Nothing in Douglass' motion calls into question the Court's earlier order. It is therefore ORDERED that her motion for reconsideration of the Court's earlier order denying her motion for partial certification under Rule 54(b) is DENIED.

Douglass also asks the Court to reconsider its order denying her motion to investigate and confiscate. In that motion, Douglass asserted that a Federal Aviation Administration ("FAA") employee, who was alleged to be a black witch, was trying to harm her through the use of various forms of black magic, including, but not limited to, the use of voodoo and hoodoo witchcraft. Douglass asked the Court to investigate this employee and confiscate any "voodoo dolls, candles, knives, swords, found upon any black witch's alter with her [Douglass'] name ..." In her motion for reconsideration, Douglass further asks that Laverne Smith Scales, the alleged lack witch, be joined as a party in accordance with Rule 19(a).

Under Rule 19(a), a person should be joined as a party to the action if in the person's absence complete relief cannot be accorded among the parties. Rule 19(a) does not require the joinder of Laverne Smith Scales. Douglass cannot obtain relief against an individual FAA employee for alleged violations of Title VII. The proper defendant in a Title VII action is the head of the agency alleged to have engaged in the discriminatory conduct. Lamb v. United States Postal Service, 852 F.2d 845, 846-47 (5th Cir. 1988). Accordingly, the Court ORDERS that Douglass' request for reconsideration of the Court's order denying her motion to investigate and confiscate is DENIED.

Douglass shall file her amended complaint as provided for in the Court's January 24, 1997 order within thirty (30) days of the date this order if filed. Douglass is again advised that failure to comply with this order may result in sanctions being imposed against her.

The Court further ORDERS that the parties shall within forty-five (45) days of the date of this order meet and prepare a joint status report. At the meeting, the parties shall agree on a date for completion of discovery, and proposed pretrial conference and trial dates.

Because Douglass is proceeding pro se, defendant shall be responsible for initiating this meeting and preparing the joint status report. Douglass, however, shall cooperate fully in the entire process.

Signed this 10th day of March, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

Plaintiff Janet Douglass has filed an unopposed motion asking the Court to certify its May 21, 1996 Order as a partial final judgment under Fed.R.Civ.P. ("Rule") 54(b). For the reasons set out below, the motion is denied.

I. FACTS

Briefly, Douglass alleges the following facts. Douglass was employed by the Federal Aviation Administration ("FAA"). In 1988, she allegedly discovered what she believed to be criminal activity by a FAA manager. Based on this discovery, Douglass made what she believed to be an anonymous report about the manager's activities to the Department of Transportation Inspector General's Office and the FAA complaint hotline. But she found out later that others within the FAA knew that she was the caller. As a result of the disclosure of her identity as the caller, persons within the FAA retaliated against her by subjecting her to various constitutional and non-constitutional torts.

In 1990, Douglass was allegedly forced to transfer to another division within the FAA, headed by Walter Ernst. While under Ernst's supervision, Douglass was allegedly subject to various forms of harassment. Douglass further alleges that as a result of false charges brought by a fellow employee she was placed on an impossible performance improvement plan. When she was unable to meet the performance plan standards, she was fired. Douglass appealed to the Merit System Protection Board, and the Merit System Protection Board reinstated her.

After returning to work, Douglass began experiencing medical problems and used up most of her sick leave. During this same period, FAA officials began investigating Douglass' abuse of the sick leave policy. Douglass alleges that the investigation resulted in numerous violations of her

constitutional and non-constitutional rights. Eventually, Douglass' employment with the FAA was terminated, and Douglass brought this suit.

Defendant United States of America ("government") moved for dismissal and/or summary judgment on Douglass' claims. On May 21, 1996, the Court dismissed most of Douglass' claims and granted summary judgment for the government on one of Douglass' claims. Remaining for further consideration were Title VII claims for sex based discrimination and discriminatory reprisal. The order also provided that Douglass could re-file any claims she might have alleged concerning reprisal by the FAA for her alleged protected whistle blowing activity.

On September 23, 1996, the Court denied Douglass' motion for reconsideration, and Douglass appealed. On December 20, the Fifth Circuit dismissed Douglass' appeal because this Court had not entered a partial final judgment under Rule 54(b). Douglass now asks the Court to certify its May 21 Order as a partial final judgment.

## II. ANALYSIS

Rule 54 provides that "[when more than one claim for relief is presented...or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." "One of the primary purposes behind Rule 54(b) is to avoid piecemeal litigation, ...{a}and a district court should grant certification only when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." PYCA Indus., Inc. v. Harrison County Waste Management Dist., 81 F.3d 1412, 1421 (5th Cir. 1996); Page v. Gulf Oil Corp., 775 F.2d 1311, 1312 n.2 (5th Cir. 1995). When deciding whether to enter partial final judgment, a court should consider such factors as whether the claim under review are separable from the remaining claims and whether the claims already determined are such that the appellate court would have to

decide the issues more than once. Curtis-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 100 S.Ct. 1460, 1465 (1980).Guided by these principles, a district court is to use its discretion to decide whether a partial judgment should be certified under Rule 54(b). See Jasmine v. Dumas, 726 F.2d 242 (5th Cir. 1984).

Douglass claims that without certification of the May 21 Order she will suffer irreparable loss because no further litigation can be had on those issues. She is incorrect. Douglass remains free to appeal any, or all, aspects of the May 21 Order after the entry of final judgment in this case. Douglass has failed to show that there exists some danger of hardship or injustice if an immediate appeal is not allowed; therefore, certification under Rule 54(b) is improper.

Moreover, Douglass alleges that all her injuries stem from the disclosure of her identity as the caller to the FAA hotline. See, e.g., Plaintiff's First Amended Complaint at pp. 16, 31. Thus, if the Fifth Circuit were to hear multiple appeals in this case, it would have to hear more than once the facts and issues concerning the disclosure of Douglass' identity as the FAA hotline caller. Such a result supports the Court's decision not to enter a partial final judgment.

## III. CONCLUSION

Accordingly, the Court ORDERS that Douglass' motion for Rule 54(b) certification of the Court's May 21 Order is DENIED.

Douglass shall have thirty days from the date of this order to file an amended complaint in accordance with the instructions in the Court's May 21, 1996 order. If Douglass fails to file an amended complaint within this period, the Court will presume that Douglass does not wish to pursue whatever reprisal claim she might have alleged, and will proceed with her remaining Title VII claims of sex discrimination and discriminatory reprisal.

Douglass shall serve Secretary Pena with her amended complaint and provide proof of service to the Court.

Signed this 24th day of January, 1997.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

## ORDER

Plaintiff Janet Douglass has filed an motion to investigate and confiscate. The motion requests relief outside the scope of the underlying suit; accordingly, the Court ORDERS that the motion is DENIED.

Signed this 16th day of January, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER RETAINING RECORD IN DISTRICT COURT

It appearing that Plaintiff Janet Lou Douglass filed a notice of appeal with the Fifth Circuit Court of Appeals from the District Court's "Opinion and Memorandum of May 22, 1996 with final order entered in this action the 23rd day of September 1996." The order/judgment does not dispose of the case, and the use of the entire case record will be required in further proceedings in this case;

It is therefore ORDERED by the Court, pursuant to Rule 11(e), Federal Rules of Appellate Procedure, that the Clerk of this District Court shall retain the record or parts thereof subject to the request of the Court of Appeals.

It is further ORDERED that the Appellants file with the Clerk of Court a designation of record and a transcript order within ten (10) days from the filing of this order along with certified copies of the documents designated for transmission of the record to the Clerk of the United States Court of Appeals for the Fifth Circuit.

The Clerk of the Court shall transmit a certified copy of this order and of the docket entries together with the record designated to the Clerk of the United States Court of Appeals for the Fifth Circuit.

Signed this 8th day of October 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MEMORANDUM OPINION AND O R D E R

Before the Court is Defendants' (collectively "government") motion to dismiss or for summary judgment. Plaintiff Janet Douglass argues vigorously that the government's position has no force because the government knows it acted in an unconstitutional manner. The Court finds that the majority of Douglass' claims should be dismissed, the government should be granted summary judgment on one claim, and the remainder of the claims must remain for future consideration.

I. FACTS

The following factual allegations are taken from Douglass' amended complaint.[3]

Douglass began her employment with the Federal Aviation Administration ("FAA") in 1978 as an administrative technician employed in the FAA Southwest Region. In 1988, she discovered what she believed to be criminal activity by the manager of the Airway Facilities Division, Clinton Murphy. Motivated y her Amish beliefs and her Episcopal faith, which require her to follow God's law rather than man's law when there is a conflict between the two, Douglass reported the violations to the Department of Transportation Inspector General's Office and the FAA Complaint hot-line. When she placed the call to the hot-line, she requested and was granted anonymity. The FAA hot-line complaint sheet does not list her name. A caller is identified on the hot-line complaint sheet by her hot-line control number only.

After Douglass' disclosure to the hot-line, the Attorney General began an investigation into Murphy's allegedly illegal activities. On February 16, 1988, the FAA circulated an internal

[3] Douglass' factual account ends, for the most part, when her first complaint is filed. Where her factual allegations are insufficient, the Court will rely on the government's factual allegations. Such reliance will be noted in the text of this opinion.

memorandum containing Douglass' allegations against Murphy and her hotline control, but it did not disclose Douglass as the complainant. Two weeks later, the Fort Worth Star-Telegram printed a story about the FAA's investigation into Murphy's Activities. Douglass' name was not contained within the article. On April 18, 1988, the FAA circulated a second internal memorandum concerning the investigation. Again, the memorandum contained Douglass' hot-line control number but not her name. On April 21, 1988, the Star-Telegram printed a second story, which did not include Douglass; name, stating that the Department of Justice found that Murphy did not violate any laws.

In the spring of 1989, Marvin Benson became Douglass' supervisor. Douglass states that Benson, who was a close friend of her ex-husband, was upset that she divorced her husband. Because of these feelings, Benson, who was not a psychiatrist, conducted daily evaluations of Douglass' psychological well-being. He then used his evaluations as a basis for disciplining Douglass and requiring her to see a psychiatrist. Douglass further alleges that even though she completed the counseling and had previously been given satisfactory performance evaluations, Benson rated her work performance barely successful. In addition, Benson continually changed her performance criteria so that she could not meet them. Finally, Douglass states that Benson moved her office closer to where her ex-husband worked to inflict emotional distress upon her.

In August 1990, Douglass was allegedly forced to transfer to another division, headed by Walter Ernst. Douglass contends that while supervised by Ernst, she created a new computer automation system for which she did not receive proper credit, and she was verbally harassed by male employees in her office.

In August 1992, Douglass allegedly discovered that her office and other offices were engaged in a conspiracy involving the illegal compensation of night differential. She disclosed her discovery to another employee, who was African-American.

Douglass however, did not know at the time that this employee was also participating in the alleged conspiracy.

Douglass further alleges that in September 1992, Ernst received a letter of complaint about Douglass, which contained fraudulent allegations. Later in the same month, Ernst gave Douglass a letter of reprimand. Further, in October 1992, Ernst did not allow Douglass to bid on a position for which she was eligible, thus violating certain FAA management policies. Eventually he awarded the position to someone other than Douglass. As a result of Ernst's actions, Douglass filed a complaint with the FAA alleging job discrimination. The FAA has no record of this complaint.

Douglass states that in December 1992 two incidents caused her emotional distress. First, Roger Knight, whose title is not specified, promoted all the employees at Douglass' level, except Douglass', to a higher level. Knight allegedly knew about Douglass' hot-line complaint and did not promote her in retaliation for making the complaint. Second, Douglass contacted the FAA complaint hot-line and found out that her anonymous complaint made in 1988 could be accessed using her previously disclosed hot-line control number. Douglass contends this is when she first discovered that others could identify her as the whistleblower.

In early January 1993, Ernst placed Douglass on a ninety day performance improvement plan. Douglass believed this action was based on false assault charges filed against her by the African-American employee who was involved in the aforementioned conspiracy. Douglass did not meet the plan and was suspended on March 19, 1993. Later, she was fired. As a result of her removal, Douglass filed a complaint alleging job discrimination with the FAA and appealed her removal to the Merit Systems Protection Board ("MSPB"). The Equal Employment Opportunity Commission ("EEOC") Office never ruled on the complaint, but the MSPB reversed the decision to remove her. Douglass was reinstated and told to report back to work on February 14, 1994.

During the period she was not working for the FAA, Douglass filed two discrimination complaints, which alleged discrimination on the basis of religion.

Douglass alleges that she experienced medical problems as a result of her return to the hostile working environment. According to Douglass, Ernst, Loyd Halliburton, and other male employees received sexual satisfaction when they verbally abused her. In March 1994, Douglass was sick for much of the month and used up all her available sick leave. Also during this period, she was removed from the alternate work schedule, which allowed employees to work flexible ten hour days. Because of this removal, Douglass filed an additional job discrimination complaint with the FAA on March 15, 1944.

In April 1994, based on an anonymous letter, FAA officials began investigating Douglass' alleged abuse of sick leave. Specifically, the investigators wanted to know if Douglass had been attending classes at a local college while on sick leave. After obtaining her college records without her permission, the investigators determined, and Douglass later admitted, that she had been attending classes while on sick leave.

On May 2, and again on May 10, 1994, Douglass filed additional discrimination complaints alleging sexual harassment by Ernst and Halliburton, respectively.

The government contends that FAA officials instructed Douglass to appear for an interview concerning her sick leave abuse on May 24, 1994. One day before the interview, Douglass filed suit in federal court. She did not attend the interview. FAA officials then instructed Douglass to attend an interview scheduled for June 14, 1994. On June 13, 1994, Douglass filed a motion for temporary injunction, which was denied. On June 21, 1994, Douglass appeared at the interview but invoked the Fifth Amendment. After receiving a letter from the United States Attorney indicating that Douglass would not be prosecuted for any action under investigation, the FAA attempted to interview Douglass again. Douglass still refused to cooperate, and the FAA began the process of removing her. On August 11, 1994, the FAA terminated Douglass' employment.

## II. ANALYSIS

### A. Discrimination Claims

#### 1. Non-Title VII Discrimination Claims

The government argues that the Court does not have jurisdiction to hear Douglass' non-Title VII claims. Such an argument is treated as a request for dismissal under Fed. R. Civ. P. ("Rule") 12(b), failure to state a claim upon which relief can be granted. Munoz v. Orr, 559 F. Supp.1017, 1019 (W.D. Tex. 1983). In analyzing a motion to dismiss under 12(b)(6), a court is to take all of plaintiff's well-pleaded facts as true. Hishon v. King & Spaulding, 467 U.S. 69, 104 S.Ct. 2229, 2232 (1984). The facts pleaded, however, must be specific and not mere conclusory allegations or unwarranted deductions. Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992). A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the claimant's allegations. Hishon, 104 S.Ct at 2232.

Title VII prohibits discrimination in federal employment on the basis of race, religion, sex, or national origin and is the exclusive remedy for claims of discrimination in federal employment. Brown v. General Services Admin., 425 U.S. 820, 96 S.Ct. 1961, 1969 (1976). If a federal employee brings a claim under Title VII and, based on the same set of facts, brings additional non-Title VII claims, the latter claims are barred. Rowe v. Sullivan, 967 F.2d 186, 189 (5th Cir. 1992) (claims for relief under 42 U.S.C. Section 1981, 1983 and 1985(3) arising from same facts as Title VII claim were preempted); Irwin v. Veterans Admin., 874 F.2d 1092, 1095-96 (5th Cir. 1989), aff'd on other grounds, 498 U.S. 89, 111 S.Ct. 483 (1990) (claims under 42 U.S.C. Section 1985 and 1986 were not sufficiently distinct; therefore, they were barred by exclusivity provisions of Title VII); Porter v. Adams, 639 F.2d 273, 277 (5th Cir. 1981) (employee's claim of reprisal for filing discrimination complaint could not be brought under Fifth Amendment because Title VII provided the exclusive remedy).

Douglass groups her claims into nine "counts." Each count is devoted to a certain type of wrong committed by the

FAA (e.g., racial discrimination in employment) and within each count there are numerous causes of action. Counts two through five concern Title VII and related causes of action. The following are Douglass' non-Title VII causes of action listed according to the count in which they appear:

1. Count Two, Racial Discrimination in Employment - Retaliatory Treatment: 42 U.S.C. Sections 1981, 1986; 28 U.S.C. Sections 1331, 1391, 1943(a).

2. Count Three, Physical Handicap Disability Discrimination in Employment: 42 U.S.C. Sections 1981, 1986; 28 U.S.C. Section 1943(a), 1391(e).

3. Count Four, Sex Discrimination in Employment: 42 U.S.C. Section 1986; 28 U.S.C. Sections 1343(c), 1391(e).

Each count in the complaint sets out the alleged facts that Douglass believes establish her right to recovery under the statutory provisions she cites. Douglass has not distinguished the facts supporting her non-Title VII discrimination claims from those supporting her Title VII claims; nor can the Court make such a distinction. Because Douglass has failed to establish an independent factual basis for her non-Title discrimination claims, those claims must be dismissed.

2. Title VII Discrimination Claims

a. Proper defendant

In a Title VII action the only proper defendant is the head of the agency that engaged in the alleged discrimination. Lamb v. United States Postal Service, 852 F.2d 8 52 F.2d 845, 846-47 (5th Cir.1988); Hall v. Small Business Admin., 695 F.2d 175, 180 (5th Cir. 1983). Thus, here, the Secretary of the Department of Transportation is the only proper defendant, and all other defendants must be dismissed as to the Title VII claims.

b. Administrative prerequisites to suit

The government moves for dismissal of Douglass' Title VII claims on the ground that Douglass failed to exhaust her administrative remedies prior to bringing suit in federal court. Because exhaustion of administrative remedies is a jurisdictional prerequisite to suit in federal court, this argument is treated as a request for dismissal under Rule 12(b)(1). See National Ass'n

of Gov't Employees v. City Public Service Bd. of San Antonio, 40 F.3d 698, 711 (5th Cir. 1994) (court has not jurisdiction to hear Title VII case when aggrieved party has not exhausted administrative remedies); Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990) (same). When determining if dismissal under 12(b)(1) is warranted, a court may decide the issue of subject matter jurisdiction on the basis of (1) the complaint alone; (2) the complaint and any undisputed evidence; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), Cert denied, 454 U.S. 897 (1981).[4]

The first step for a claimant seeking redress under Title VII is to meet with an equal employment opportunity (EEO) counselor within fort-five days of the alleged unlawful employment practice for pre-complaint counseling. 29 C.F.R. Section 1614.105. Failure to meet this requirement bars a complaint from being filed in federal court, absent an adequate showing by the employee of waiver, estoppel, or equitable tolling. Rodgers v. Scott, 901 F. Supp. 224, 228 (N.D. Tex. 1995); Ross v. Runyon, 858 F.Supp. 630, 637 (S.D. Tex 1994).

Here, the government submitted the declaration of Arturo Montoya, the Civil Rights Manger of the FAA Southwest Region. this declaration lists Douglass' complaints filed under Title VII and the extent to which she pursued administrative remedies. Douglass has not filed any contravening evidence.[5] Based upon Montoya's declaration, the following discrimination complaints cannot be the basis for an action in this Court because Douglass failed to contact an EEO counselor within forty-five days of the alleged discriminatory conduct and has not produced any evidence that would support a finding of waiver, estoppel, or equitable tolling:

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[4] A district court may consider affidavits or other matters outside the pleadings when deciding a motion to dismiss under Rule 12(b)(1). See Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 188 n.5 (5th Cir. 1986).

[5] Douglass' only attempt to show she has exhausted administrative remedies is her argument that she satisfied this requirement when she filed her first complaint with the agency. She cites no authority for this proposition and the Court will not treat her argument as contravening Montoya's declaration.

1. Complaint filed October 24, 1993 and amended November 1, 1993, alleging discrimination based on whistleblowing activity and religion.

2. Complaint filed October 27, 1993 and amended November 1, 1993, again alleging discrimination based on whistleblowing activity and religion.

c. Failure to wait 180 days

If the discrimination action is not resolved through counseling with an EEO counselor, the complainant has fifteen days from the receipt of notice of right to file a formal complaint to file such a complaint with the EEOC. 29 C.F.R. Section 1614.105. A claimant who then wishes to pursue her claims in federal court must have either received a final agency decision on her complaint or waited 180 days from the date the complaint was filed with no agency action. If there has been no agency activity after 180 days, the claimant may continue to wait for agency or EEOC action or may proceed with her claim in court. 42 U.S.C. Sections 2000e-16(c); Gomez v. Dept. of the Air Force, 869 F.2d 852, 857-58 n.13 (5th Cir. 1989). But if a final decision has not been issued and an impatient claimant does not wait 180 days to file in district court, the complaint is premature and will be dismissed. Munoz v. Aldridge, 894 F.2d 1489, 1492-93 (th Cir. 1990); Porter v. Adams, 639 F.2d 273, 275-76 (5th Cir. 1981)

Defendants seek dismissal of a number of Douglass' claims based on her failure to wait the necessary time prior to filing this action. Douglass response that she exhausted her administrative remedies because she waited 180 days after filing the first charge before filing her complaint in federal court and all her later charges were simply follow-up to the original charge. Finding no authority for Douglass' position, the Court dismisses her discrimination claims based on the following complaints, on which there had been no final agency action at the time this action was filed and 180 days had not elapsed since Douglass' filing of the complaints with the FAA:

1. Complaint filed March 15, 1994, alleging sex and reprisal discrimination.

2. Complaint filed April 20, 1994, alleging discrimination based on sex and reprisal. Also filed under Rehabilitation Act for handicap discrimination.

3. Complaint filed May 2, 1994, alleging sexual harassment by Ernst.

4. Complaint filed May 10, 1994, alleging sexual harassment by Halliburton.

d. Racial discrimination claim

Prior to filing this action, Douglass exhausted her remedies as to only one of her administrative complaints, the complaint filed on June 1, 1993 alleging discrimination on the basis of race, sex, and reprisal. The racial discrimination portion of this complaint, however, must be dismissed. Douglass asserts this claim under 42 U.S.C. Section 2000a-6, which prohibits discrimination in public accommodations and has no application under the facts of this case. The government's motion clearly explains that Douglass can only seek relief under Section 2000e-16, but she has refused to proceed under this section. Therefore, Douglass' racial discrimination claim under 42 U.S.C. Section 2000a-6 is dismissed.

e. Remaining Title VII claims

Two Title VII claims have not been dismissed, discrimination based on whistleblowing activity and gender. Although Douglass did not designate Frederico Pena, the Secretary of Transportation by name, considering her pro se status, the court will permit her to amend the complaint to do so, provided she serves the Secretary with the amended complaint. Further, the court denies summary judgment on these claims based on the current state of the record. A party moving for summary judgment bears the initial burden of establishing that there is no issue for trial; it may do so by pointing out the lack of evidence supporting the non-moving party's claims. Duffy v. Leading Edge Products, Inc. 44 F.3d 308, 312 (5th Cir. 1995). In its motion, the government neither set forth the elements of Douglass' discrimination claims, nor pointed to the lack of evidence supporting each element. Absent such a showing,

Douglass was not required to establish a genuine issue of material fact. Accordingly, these claims remain for future consideration.

B. Privacy Act Claim

Douglass posits that her first call to the FAA hotline was a protected record under the Privacy Act, and that when her hot-line control number was disclosed, the Act was violated. 5 U.S.C. Section 552a, et seq. She has attached to her response to the government's motion a notarized copy of the hot-line complaint sheet, articles from the Fort Worth Star Telegram, and copies of the FAA internal memoranda concerning her call. Because the Court considered this evidence, the government's motion as to this claim will be treated as one for summary judgment. Rule 12(b).

After the party moving for summary judgment has made an initial showing that there is no material issue of fact, the party opposing the motion must come forward with competent summary judgment evidence establishing the existence of a genuine fact issue. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1355 (1986). If the non-moving party is unable to show a fact issue exists, the motion for summary judgment must be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986).

Initially, the Court notes that the only proper defendants as to this claim are agencies; therefore, all individual defendants are dismissed from this cause of action. Petrus v. Bowen, 833 F. 2d 581, 582-83 (5th Cir. 1987).

The Privacy Act, 5 U.S.C. Section 552a (g)(1)(c),provides, inter alia, that an individual may bring a civil action against an agency when it fails to properly maintain a record concerning that individual, as a result of which the person suffers adverse consequences. In order to qualify as a record, an item must be "about" an individual and contain the individual's name or other identifying particular. Toby v. N.L.R.B., 40 F.3d 469, 471 (D.C. Cir. 1994). Douglass has failed to show that the hot-line complaint sheet was "about" her. The fact that a record of her call was made does not make the call about her. Tobey,

40 F.3d at 471-72; Unt v. Aerospace Corp., 765 F.2d 1440, 1149 (9th Cir. 1985) (letter written by appellant was not about appellant). Accepting the allegations of the complaint as true, a record of Douglass' call would simply contain her statements about what she believed were the illegal activities of a third party. Further, Douglass has failed to show her identity as the caller was ever disclosed. All she has demonstrated in this regard is that her assigned hot-line control number can be used to access the database containing information about the call she made in 1988, and that it was in fact used for this purpose. The government will be granted summary judgment on Douglass' Privacy Act claim.

C. Constitutional Claims

The government argues that Douglass' constitutional claims are preempted by the Civil Service Reform Act (:CSRA"), 5 U.S.C. Section 2301, et seq. This argument is treated as one for dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See Palermo v. Rorex, 806 F. 2d 1266, 1270 (5th Cir.) cert denied, 484 U.S. 819 (1987).

Douglass claims several of her constitutional rights were violated during the course of her dispute with the FAA. She alleges, among other things, her Fifth Amendment rights were violated when she was suspended without a proper hearing, her Fourth Amendment rights were violated when FAA investigators obtained her college transcript without her express written consent, her First Amendment rights were violated when she was retaliated against for following God;s law by speaking out against the illegal practices within the FAA, and her Fourteenth Amendment rights were violated by the pervasive sexual harassment she experienced.

In Bivens v. Six Unknown Named Agents of FBI, the court held that in some circumstances a plaintiff may bring a claim against the government for certain constitutional violations. 403 U.S. 388, 91 S.Ct. 1999 (1971). the ability to bring a Bivens claim, however, may be limited where special facts counsel hesitation or congress clearly has intended to

provide another remedy as a substitute for a Bivens action. Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404, 2411 (1983). In Bush, the court found that the administrative framework established by the CSRA, with its comprehensive nature, provided the exclusive remedy for a federal employee's claim that his employer violated his First Amendment rights. 103 S.Ct. at 2416-17. The Fifth Circuit has applied the Bush analysis to preclude Bivens claims by federal employees under the First, Fourth, Fifth, and Sixth Amendments. Rollins v. Marsh, 937 F.2d 134, 139 n.24, 25 (5th Cir. 1991). In fact, no court yet has found a federal employee's Bivens claim that has not succumbed to the Bush analysis. Id. at 139. Thus, while Rollins did not specifically address claims under the Thirteenth and Fourteenth Amendments, the court finds its holding equally applicable to such claims.

Douglass was a federal civil service employee and the alleged constitutional violations arose during and related to Douglass' federal employment relationship; therefore, Douglass must pursue her remedies under the CSRA. Rollins, 937 F.2d at 138.

D. Non-Constitutional Tort Claims

Douglass asserts numerous claims for non-constitutional torts committed by individuals and entities during the course of her employment relation with the FAA. Without listing all her claims, the Court notes as an example that Douglass alleges the conspiracy to terminate her employment in May 1993 resulted in her suffering severe emotional distress, defamation of character, property loss and was an act of malicious prosecution.

The government argues that these claims can be brought only against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 2671, et seq. because the individual defendants were acting within the scope of their employment. It also contends these claims are not properly before the court because Douglass failed to file a prerequisite administrative claim. Douglass has presented these claims as independent state law claims. Whether these claims are brought under the FTCA or as independent state law claims, they are not properly before

this court and therefore shall be dismissed under Rule 12(b)(6). See Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991), cert denied, 503 U.S. 908 (1992) (a court on its own motion may dismiss a complaint for failure to state a claim upon which relief can be granted).

The court finds that Rollins bars Douglass from bringing these claims. In Rollins, the plaintiffs brought, in addition to their constitutional claims, claims under the FTCA and state law claims against several government officials and the Secretary of the Army. The court found that "Congress's purpose in enacting the CSRA was to channel grievances and disputes arising out of government employment into a single system of administrative judicial review." Id at 139 (quoting Rivera v. United States, 924 F.2d 948 (9th Cir. 1991)). The existence of the CSRA prevents a federal employee from bringing claims arising from her federal employment relationship under either the FTCA or state law. Id, at 139-140. Inasmuch as Douglass has not shown she has exhausted administrative remedies under the CSRA, her state law claims re not properly before the Court. Ferry v. Hayden, 954 F.2d 658, 661 (11th Cir. 1992).

E. Other Allegations

Finally, Douglass makes some generalized complaints about how she was unlawfully discharged as a result of her disclosure concerning Murphy's alleged illegal activities. But she has not specifically pleaded any cause of action in this regard, and the Court cannot determine what relief she is requesting. Therefore, these generalized allegations are dismissed without prejudice. If Douglass wishes to pursue these matters throughout this action, she must specifically set forth the relevant facts, the nature of her claims, and the relief requested.

## III. CONCLUSION

Accordingly, it is ORDERED that the following claims are DISMISSED with prejudice:

1. All Title VII claims against all defendants except those against Secretary of Transportation Frederico Pena as set out below.

2. All title VII claims against Secretary Pena that were dismissed by the EEOC for failure to contact an EEO counselor within forty-five days of the alleged discriminatory conduct.

3. All Title 28 and Title 42 claims against all defendants.

4. All constitutional claims against all defendants.

5. All non-constitutional tort against all defendants.

It is further ORDERED that the following claims are DISMISSED without prejudice:

1. All title VII claims against Secretary Pena that were dismissed because Douglass filed a claim in this Court before 180 days had run from the filing of her Title VII complaint. She may re-file these claims if she establishes that she as exhausted her administrative remedies in regards to these claims.

2. The claim alleging retaliation for whistleblowing activity. Douglass may re-file this claim provided she complies with the directions set out in section E of this opinion.

It is further ORDERED that to the extent that Douglass desires to proceed with this action, she shall file an amended complaint naming the Secretary of Transportation, Frederico Pena, as sole defendant with regard to her remaining Title VII claims alleging sex-based-discrimination and discriminatory reprisal arising from her suspension on March 29, 1993. The amended complaint shall include only those facts necessary to support her remaining claims of discrimination based on gender and whistleblowing and her claim of unlawful discharge. Douglass shall serve Secretary Pena with this amended complaint by June 28, 1996 and provide proof of service to the Court by July 19, 1996. Failure to comply with this order shall result in the dismissal of Douglass' remaining claims.

Signed 21st day of May 1996.